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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 44.

DISTRICT OF COLUMBIA, PETITIONER,

vs.

GEORGIANA THOMPSON.

BRIEF ON BEHALF OF RESPONDENT.

PAUL V. ROGERS,
WILLIAM E. FUREY,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF CASE.

With the exception of the omission noted below respondent accepts as fair and accurate petitioner's statement of the case.

In referring, on page 5 of petitioner's brief, to the letter of the Auditor of the District of Columbia to one

of counsel for respondent, petitioner fails to set forth that this letter was introduced and admitted in evidence for the sole purpose of establishing respondent's first knowledge of the intention of the District of Columbia to abandon, or that it had abandoned, the purpose for which the special assessment in question was levied and collected (R., pp. 8, 9). It expressly appears in the record (R., pp. 8, 9) that this letter was *not* considered by the trial court as an admission on the part of the District of Columbia.

ARGUMENT.

I.

Jurisdiction of Municipal Court.

Counsel for the petitioner contend that the Municipal Court of the District of Columbia was without jurisdiction over the present cause of action for the following reasons, namely; that the assessment herein involved was a special levy, free from duress or mistake, in the exercise of the power of taxation, and upon which a personam obligation could not, therefore, legally be predicated; and further, that no valid contractual relation existed between respondent and petitioner as a result of the special levy because of the statutory disability of the Commissioners of the District of Columbia to enter into any contract not authorized by Congress. We respectfully submit that these objections are without merit.

Special or local assessments are similar to general taxation to the extent only that both are drawn from the legislative power to tax. *Baum v. Ross*, 167 U. S. 548. The general levy of taxes is understood to exact contributions in return for the general benefits of gov-

ernment, and it promises nothing to the person taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are levied upon the assumption that a portion of the community is to be specially benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds. The justice of demanding special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. Upon this basic idea are predicated all special assessments. To require the payment of a local assessment where no direct and equal benefit is given in return is a taking for the public use without just compensation and a violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

Norwood v. Baker, 172 U. S. 269
Illinois Cent. R. Co. v. Decatur, 147 U. S. 190
Baum v. Ross, 167 U. S. 548.
Hagar v. Reclamation District, 111 U. S. 701

The action brought in the lower court was in general assumpsit for money had and received. The right to maintain an action in assumpsit in the Municipal Court of the District of Columbia is beyond question. Whether the action of assumpsit for money had and received will lie on the present statement of facts, we will now consider.

In the case of *Valentine v. St. Paul*, 34 Minn. 446, an assessment had been levied upon the plaintiff's property as benefits to enure from the grading of an abutting street. The assessment was paid and later the city abandoned the entire prospect. An action in assumpsit for money paid was brought by the taxpayer. It was said by the Court in sustaining the plaintiff's right to recover;

> "The city stands in the position of holding money collected from the plaintiff which it has no right in equity, good conscience, or common honesty to retain, because the purpose for which it was collected has been completely abandoned. In such circumstances no statute is required to impose upon the city a legal obligation to make restitution. An action lies as at common law for money had and received. No question of voluntary or involuntary payment before abandonment is material."

In the case of the *City of San Antonio v. Peters*, 40 S. W. 827 (Texas), the city proceeded by condemnation to widen a street, and in proceeding so to do levied a special assessment against the plaintiff's property for benefits. The plaintiff paid the assessment and later the city abandoned its intention to widen the street. The Court allowed the plaintiff to recover the assessment paid in an action in assumpsit on the theory that the abandonment of the purpose for which it was collected constituted a failure of consideration.

In *Bradford v. City of Chicago*, 25 Ill. 349, which was a suit to recover back moneys paid under special assessment, it was ruled that where a street is not opened in a reasonable time the moneys paid as assessments for benefits may be recovered back in assumpsit,

on the theory that the consideration has wholly failed. The Court said:

> "In projecting this improvement by the city, and raising money by condemning property supposed to be benefitted by the improvement, the city undertook that they would proceed according to law in making the assessments, and would devote the money raised to the completion of the undertaking, in a reasonable time. It was on this undertaking the plaintiff, voluntarily, we will say, paid his money. He trusted to the good faith, intelligence and integrity of the city officials, that by no fault, misconduct or miscarriage of their own, the work should be unreasonably delayed; that the improvement should be made in a reasonable time, and fully carried out. The city has failed to do it, and has given, and can give no assurance whatever that the improvement shall be made. The plaintiff may well contend, that he has paid his money on a consideration which has failed—that he has acquiesced in no delay, and that he ought to have his money restored to him, and which he demanded one year before he commenced his suit."

In every case in which this question has come to the attention of the courts of this country the right to recover the assessment paid by an action at law has been upheld.

Valentine v. St. Paul, 34 Minn. 446
Bradford v. City of Chicago, 25 Ill., 349, 359
McConville vs. St. Paul, 75 Minn. 383
City of San Antonio v. Walker, 56 S. W. 952
Neer v. City of Salem, 149 Pac. 476, 478.
City of San Antonio v. Peters, 40 S. W. 827

The inevitable conclusion to be drawn from the cases cited above is that the actual payment of a special

assessment—not the condemnation proceedings instituted to condemn the land out of which the assessment grew—gives rise to a personal obligation on the part of the condemning party to return the money collected when its payment is followed by an abandonment of the purpose for which it was collected and paid. It was pointed out by the Court in the Bradford case, *supra*, that in the case of special assessments the money raised by the condemning party is held in trust to be devoted to the particular purpose of the benefit intended. Whether the theory of failure of consideration, or that of a terminated trust is accepted, is of little importance; either theory sustains the right of the respondent to recover.

We respectfully submit that the present cause of action is not, as counsel for petitioner contend, based on a contractual obligation, but, to the contrary, is purely quasi-contractual in nature. The law needs no express contract nor statute authorizing restitution, to afford relief where the city has been unjustly enriched at the expense of the taxpayer. Valentine v. St. Paul, *supra*.

II.

The Statute of Limitations.

The operation of the Statute of Limitations in bar of the present cause of action necessarily requires a determination of the time when the right to maintain such action accrued. Counsel for petitioner contend (Brief page 10) that the lower Court held, as a matter of law, that a contractual relation existed between the parties to this suit obligating the District of Columbia to physically improve Lamont Street. Such an interpretation cannot properly be considered the ruling of

the lower Court. The question considered by the lower Court was whether the municipality might retain money collected as special benefits to accrue from the opening of a street without incurring any legal obligations to open it. (R., p. 18.) The levying and collecting of special assessments in anticipation of a street improvement is more properly to be considered as raising a condition that the purpose for which the assessment is levied and collected will be carried out. It is the violation of this condition, and not the breach of a supposed contract, which gives rise to respondent's right to recover back the assessment paid. Such being the case, we submit that the Statute of Limitations commences to run from a breach of the condition after notice of such breach can reasonably be imputed to the respondent. As was said in the case of the American Security & Trust Co. v. Rudoph, 38 Appeals, D. C., at page 42, "the assessments of damages and benefits must be based on the purposes for which the condemnation proceeding were directed." *A fortiori*, the collection and payment of the assessment levied must be based on the purpose for which the land in question was condemned. When that purpose is abandoned a right immediately accrues to the taxpayer to recover the amounts so paid. Any other conclusion would sanction the taking of private property for public use without compensation.

An examination of the record discloses that from February 3, 1913, the date when the land in question was condemned, until 1924, a period of eleven years, no attempt was made by the District of Columbia to open or improve Lamont Street. (R., p. 7.) The first alteration of the natural condition of the land condemned was in 1924 when the District of Columbia

laid and completed a cement sidewalk and curb across the east end of the condemned tract, creating an effective obstruction to any vehicular traffic over the land (R., p. 7). The lower Court held that this obstruction indicated an intent to delay the actual opening of the street, and was not *conclusive* of the intention on the part of the municipality to abandon the project. (R., p. 19). This act on the part of the District of Columbia, although not conclusive on the question of abandonment, is certainly evidence tending to prove abandonment and was so considered by the trial court together with the long lapse of time before its occurrence and the failure thereafter of the District of Columbia, by a removal of the obstruction or otherwise, to evidence an intention other than one of abandonment. There being no obligation imposed on the municipality by the Act of Congress of March 1, 1912, to open and extend Lamont Street within a specified time, respondent was required to wait patiently for the municipality to evidence its unwillingness so to do before an action would lie for a return of the assessment paid. It is our contention, therefore, that at the time of the letter from the Auditor of the District of Columbia to one of counsel for respondent, more than two years after the blocking of Lamont Street, petitioner's act of obstruction had ripened into a complete and conclusive abandonment. The contents of the letter, although not an admission of abandonment, placed respondent on her guard to either assert her right to a refund of the assessment paid, or be barred by the Statute of Limitations. This suit, having been filed on June 22, 1927 (R., p. 1) and within three years from the time when the right to maintain the same accrued, is therefore free from the operation of the Statute of Limitations.

III.

Abandonment.

Counsel for petitioner assign as error the ruling of the court below that the District of Columbia in fact abandoned the extension of Lamont Street, or could as a matter of law so abandon. We shall consider these objections separately.

Abandonment as matter of fact.

Counsel for petitioner contend that the only evidence on the question of abandonment before the trial court was the communication of the Auditor of the District of Columbia to one of counsel for respondent (R., p. 7), which letter, they contend, was improperly considered by the court below as an admission on the part of petitioner that it had abandoned the proposed extension of Lamont Street. This is clearly inconsistent with the record. The letter referred to was introduced and admitted in evidence at the trial of the cause for the sole purpose of establishing respondent's first knowledge of the intention of the District of Columbia to abandon, or that it had abandoned, the purpose for which the special assessment in question was levied and collected. (R., pp. 8, 9.) It further appears from an inspection of the record (R., pp. 8, 9) that this letter was not considered by the trial court as an admission on the part of the District of Columbia. The matters contained in the letter were accepted by the Court of Appeals as true in fact because of the judicial admission thereof by petitioner when the cause was before that court. (R., p. 19.)

Petitioner's argument that no other evidence of abandonment was submitted by respondent is at variance

with the record. We respectfully submit that all the elements of proof generally accepted by the courts of this country as tending to establish abandonment were before the trial court. The authorities herein submitted in support of the sufficiency of the evidence on the issue of abandonment constitute an unbroken line of decisions suporting respondent's claim.

Valentine v. St. Paul, 34 Minn. 446
Bradford v. City of Chicago, 25 Ill., 349, 359
McConville vs. St. Paul, 75 Minn. 393
City of San Antonio v. Walker, 56 S. W. 952
Neer v. City of Salem, 149 Pac. 478.
City of San Antonio v. Peters, 40 S. W. 827

The Supreme Court of Maryland expressed itself on this subject in the following language:

> "The cases hold that the abandonment of a right of way condemned may be brought about in one of two ways: An explicit renunciation of the purpose to give effect to the condemnation, which, in the case of a municipality would be by a repeal of the ordinance under which the proceedings were instituted; or such an abandonment may be deduced from acts in pais, and whether these acts constitute sufficient evidence of an intention to abandon the proceedings, is a question of fact." Wagner v. Bealmear & Son, 135 Md. 690, 694.

Time is an important element on the question of abandonment and particularly goes to the intent to abandon. The lapse of time alone may be sufficient; and a great lapse of time with slight circumstances may likewise be sufficient to establish abandonment. Addressing itself to this question the Supreme Court of Maryland said:

"It is obviously unjust for the city to hold a condemnation over property for years, neither paying the assessment nor abandoning the improvement." Norris v. Baltimore, 44 Md. 592.

See also:

Holt v. Sargent, 15 Grey (Mass.) 97
Harkrader v. Carroll, 76 Fed. 474, 475
Johnson v. Rasmus, 237 Mo. 586
Burke v. Bishop, 175 Fed. 167, p. 173
Smith v. Gorrell, 81 Ia. 218

The present case clearly falls within the doctrine or abandonment by acts in pais. The argument advanced by counsel for petitioner that abandonment, to be effective, must be based on formal renunciation by the proper officials of the municipality, is obviously fallacious. Such a rule of law would permit the municipality indefinitely to conceal its true intention behind a cloak of silence, and thereby preclude a taxpayer from the assertion of a just claim.

It is interesting to notice that the resolution of the Commissioners of the District of Columbia (petitioner's brief, p. 15) asserting the intention of the District of Columbia to improve Lamont Street is dated January 23, 1929, approximately two weeks after the handing down of the opinion of the Court of Appeals (R., p. 20) upholding respondent's cause of action as set forth in her declaration filed in the Municipal Court on June 22, 1927 (R., p. 1). The promptness of petitioner's action in the face of an adverse decision requires no comment.

Abandonment as a matter of law.

It is contended by counsel for petitioner that, as a matter of law, no abandonment can be established

against the District of Columbia because its commissioners are vested with ministerial duties only; that, having been once directed by Congress to extend Lamont Street, it was beyond the power of the commissioners to alter such direction or disregard that command. No comment is made on the authorities recognized by the Court of Appeals in its opinion (R., p. 19) as establishing the liability of municipal corporations generally in a case such as the present one. Their answer to respondent's claim is, in substance, that notwithstanding the right of the District of Columbia to acquire land for street purposes by the authorization and direction of Congress, and not withstanding the right to levy and collect special assessments for benefits to be derived from the opening and establishing of such street, the municipality may with immunity retain the assessments paid and forego the purpose of their collection because its commissioners are merely administrative officers.

We respectfully submit that this contention is contrary to sound principles of law and reason. Admitting, for the purposes of argument, that the officials of the District of Columbia are mere administrative officers, the corporate character of the city is undisturbed. This Court in the case of *The Metropolitan Railroad Co. v. District of Columbia*, 132 U. S. 1, 9, after an exhaustive consideration of the present commission form of government for the District of Columbia said:

> "We are clearly of opinion that the plaintiff (District of Columbia) is a municipal corporation, having a right to sue and be sued and subject to the ordinary rules that govern the law of procedure between private persons."

It was further said in *Barnes v. District of Columbia*, 91 U. S. 540, at page 547:

> "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys and highways, the regulation of grades, and the opening of new and closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done."

The natural conclusion to be drawn from these cases is that the District of Columbia is a municipal corporation charged with the usual and ordinary duties and responsibilities of municipal corporations generally. The Act of Congress authorizing the institution of the condemnation proceedings in which the assessment in question was levied, did not, as opposing counsel contend, direct the actual opening and extending of Lamont Street, but to the contrary, merely authorized the institution of judicial proceedings to condemn the land necessary to extend Lamont Street and to assess the benefits and damages therein ascertained. The opening of the new street was, as stated by this Court in the Barnes case, *supra*, "peculiarly municipal." It was, therefore, to the District of Columbia that the respondent was required to look for her benefit. The case of *Walter v. MacFarland*, 27 App. D. C. 182, upon which counsel for petitioner relies in support of its present position, is obviously not in point. That case dealt solely with the narrowing of an established public street. Certainly the land condemned for the extension of Lamont Street can not be considered as an established public street.

The general power of control over streets, avenues, alleys, sewers and all public improvements intrusted by Congress to the charge of the former board of works under section 77, D. C. Rev. Stat. to which power the Commissioners succeeded by the Act of Congress of June 20, 1874, 18 Stat. 116, c. 337, when considered with the power and discretion vested in the Commissioners by the Act of Congress of June 11, 1878, 20 Stats. 104, to determine, annually, the work proposed to be undertaken during the fiscal year next ensuing, necessarily operates to invest the Commissioners with the authority to abandon a proposed street extension before its actual establishment, in the absence of legislative direction to the contrary. To say that the duties thus imposed on the Commissioners are ministerial in nature would be clearly at variance with settled law. The discretion vested in the Commissioners to determine the work proposed to be undertaken, necessarily carries with it a like discretion as to the rejection or abandonment of improvements proposed.

The taking of respondent's money, being based on the realization by her of an equivalent benefit to her land, is a matter cognizable by a court of law, and in a case such as the present the doctrine of estoppel operates to preclude any defense based on the limited authority of individual public officers or servants where the grievance complained of flows from the corporation itself.

Counsel for petitioner suggest that if the court below is correct in its decision and the city must refund the assessment paid, the municipality will be left with a tract of land which has been judicially determined to have been abandoned for street purposes, and therefore, of no use to the city. This, we submit, is without

foundation in fact. The property, being owned in fee simple by petitioner, may be adapted to any public use which may be deemed advisable. Or on the other hand, if the street extension project is revived, the city can, with proper legislative authorization, reassess for benefits and the payment thereof will properly fall on the present owners of the abutting properties. The passing of seventeen years from the date of condemnation in question has resulted in numerous changes of ownership of the abutting properties—a matter which can properly be judicially noticed—and therefore, it is self-evident that the original street extension project, if revived, would not yield to the many former owners who stood the expense of the contemplated improvement any of the benefits for which they were legally required to pay.

Conclusion.

The present case presents to this Court a cause proper for the relief given in the lower courts. The respondent has been required to pay two hundred dollars as her share of the cost of extending a street which exists today only on the maps of the Surveyor's office of the District of Columbia. The injustice of the situation is, without exaggeration, shocking. The District of Columbia stands today the owner of a valuable tract of land acquired by condemnation and paid for with the money of respondent and persons similarly situated. *Not one cent* has been paid by the city, yet it has abandoned the purpose for which the assessments were levied, and has refused to make restitution of the money paid. The city stands in the position of holding money collected which it has no right

in equity, good conscience, or common honesty to retain. In defense of its position the city has forsaken the merits of respondent's claim and has merely advanced abstruse technicalities of law. We respectfully submit that the decision of the lower court should be affirmed.

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